

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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|---|---|----------------|
| In the Matter of the Petition | : | |
| of | : | |
| GLOBAL IMPORTS OUTLETS, INC. | : | DETERMINATION |
| AND MOUSSA MARIZADEH, AS OFFICER | : | DTA NO. 810617 |
| | : | |
| for Revision of Determinations or for Refund | : | |
| of Sales and Use Taxes under Articles 28 and 29 | : | |
| of the Tax Law for the Period June 1, 1983 | : | |
| through November 30, 1989. | : | |

Petitioners, Global Imports Outlets, Inc. and Moussa Marizadeh, as officer, 801 Broadway, New York, New York 10003, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through November 30, 1989.

A hearing was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on March 2, 1994 at 1:15 P.M., and was continued to conclusion at the same location on May 31, 1994 at 11:00 A.M. The Division of Taxation filed its brief on July 26, 1994. Petitioners filed their brief on October 6, 1994. Petitioners appeared by Isaac Sternheim & Co. (Isaac Sternheim, CPA). The Division of Taxation appeared by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Global Imports Outlets, Inc. for the period at issue.

II. Whether Global Imports Outlets, Inc. has shown that its failure to obtain a certificate of authority, failure to file sales tax returns and failure to timely pay sales tax due was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

On February 4, 1991, the Division of Taxation ("Division") issued to petitioner Global Imports Outlets, Inc. ("Global") two notices of determination and demands for payment of sales and use taxes due for the period June 1, 1983 through February 28, 1990 assessing a liability of \$409,101.37, plus penalty and interest. On the same date, the Division issued to Global two additional notices of determination and demands for payment of sales and use taxes due for the period June 1, 1985 through February 28, 1990 assessing a penalty liability in the amount of \$45,615.84, pursuant to Tax Law § 1145(a)(1)(i) and (3)(i). The penalty portion of the liability includes \$10,000.00 for conducting a business without a certificate of authority and \$950.00 for the failure to file required returns. In addition, on the same date, the Division issued identical notices to petitioner Moussa Marizadeh, as officer of Global, under Tax Law §§ 1131(1) and 1133.

The auditor commenced the audit by mailing an appointment letter to Global on January 8, 1990 which requested that all books and records pertaining to its sales tax liability for the audit period (the audit period was listed as 7/83 through 11/89) be made available for audit. The letter specifically requested journals, ledgers, sales and purchase invoices, register tapes, exemption certificates, as well as Federal returns and bank statements.

Global is involved in the sale of reproduction antiques and antique furniture. Its business operation began in July 1983 but it did not register as a sales tax vendor or file sales tax returns from 1983 until October 1989. When Global first began business it was registered with the Federal government. However, it was advised by its accountant not to register with New York State because it was in the wholesale business.

Syrus Sedge was the president of the corporation and petitioner Moussa Marizadeh was its vice president.

At the scheduled appointment (at the place of business), the auditor received almost all the records relating to sales except for the records relating to nontaxable sales, such as sales for resale, out-of-state sales and sales to nontaxable entities. After reviewing the records provided and determining that they were adequate, the auditor and Global executed an Audit Method

Election form, dated April 18, 1990. The election form indicated that, for the audit period July 1983 through November 1989, a test period method audit would be used in the areas of sales and recurring expense purchases.

The auditor began by examining sales for the test period months of July 1987, April 1988 and November 1989. Total sales for the three-month period amounted to \$265,091.00, while sales determined to be taxable (that is, sales which lacked documentation indicating they were nontaxable sales) amounted to \$76,737.00, or 28.95% of taxable sales. Projecting these figures throughout the audit period resulted in taxable sales of \$4,830,621.00 and additional tax due of \$398,526.23. The auditor also determined that Global had accrued but not remitted sales tax in the amount of \$2,799.77 (a result of Global erroneously collecting tax on two occasions), that Global had purchased furniture and fixtures in the amount of \$53,450.00 but had not paid the sales tax due in the amount of \$4,409.62, and that Global did not pay sales tax on its recurring expense purchases of \$3,365.75. Total tax due on audit was \$409,101.37.

At the Bureau of Conciliation and Mediation Services ("BCMS") conference held on October 8, 1991, the tax liability portion of the assessment which was based upon the disallowance of nontaxable sales was reduced as a result of additional documentation presented by Global. The additional documentation presented by Global reduced the percentage of taxable sales to 21.11%. In addition, the final quarter ended February 28, 1990 was eliminated from the assessment. The conciliation order, dated January 31, 1992, issued to petitioners after the conference indicated that the amount now being assessed is \$287,536.93, consisting of tax on claimed nontaxable sales of \$277,125.09 and the tax collected, the tax on furniture and fixtures and the tax on recurring expense purchases of \$10,411.84. Global is only contesting the tax assessed of \$277,125.09 on claimed nontaxable sales.

During the course of the audit, the auditor verbally requested proof from Global's accountant that Global had made out-of-state shipments. According to the auditor, no proof was provided which established that goods were shipped out of the State by Global. During his testimony, the auditor stated that shipments made by Bedco Trucking were disallowed because

proper documentation was not presented. Furthermore, the auditor indicated that Bedco represented the purchaser, making the transaction subject to sales tax in that the transfer of title occurred in New York. With regard to another common carrier used by Global for out-of-state deliveries, F & R Antique Transport, Inc., the auditor stated that the carrier was contacted by Global but was the agent of the purchaser. According to the auditor, since the carrier was the agent of the purchaser, the sale of the goods occurred in New York and the transaction was subject to sales tax.

Global presented the testimony of Mr. Syrus Sedge, president, that when there was a sale to an out-of-state customer, Global would contact the trucker and would sign the bill of lading, which indicated "freight collect". Freight collect meant that Global remained responsible for the merchandise until it reached the purchaser. Most out-of-state sales were initiated by either the customers catalog shopping and calling in the order by telephone or the customers appearing and placing the order at Global's premises. If the merchandise arrived at the customer's location in a damaged state, Global did not get paid. Since the truckers were insured, and the particular item was damaged in transit, the insurance company paid the trucker, and the trucker and Global then reached a settlement. The customer was in no way involved because the damage occurred prior to delivery.

Global used Interstate Commerce Commission licensed carriers for its out-of-state shipments. Included within this group were Ben E. Daniels d/b/a Bedco Trucking, F & R Antique Transport, Inc. ("F & R"), P.J. Xpress ("P.J.") and Yellow Freight.

Bedco provided an affidavit from Mr. Daniels, dated December 19, 1991, which stated that Global called for the pick-up of the freight, that Global was the shipper of record and that all deliveries were freight collect. During the years at issue, Bedco was insured by Coastline Insurance Agency, Inc. Attached to a second affidavit of Mr. Daniels, dated March 15, 1994, was a list of Global customers and their addresses to which Bedco made deliveries in July 1987, April 1988 and November 1989. In reaching the conclusions that the customers were located out of state and Bedco had made the deliveries in the months indicated, Mr. Daniels reviewed

the related shipping documents supplied by Global. The customers, states and their months of delivery were as follows:

| <u>Customer</u> | <u>JULY 1987</u> | <u>State</u> |
|------------------------|------------------|---------------|
| Allan Bottgie | | Massachusetts |
| Ball and Claw Antiques | | Georgia |
| J & J Oriental Rugs | | Virginia |
| Stacey Savin Decor | | Connecticut |
| Pink Parrot | | Texas |
| Fidelity | | New Jersey |
| Connie Sleight | | New Jersey |
| Stephanie Mucciano | | Florida |

| <u>Customer</u> | <u>APRIL 1988</u> | <u>State</u> |
|-----------------|-------------------|--------------|
| Pedro Rodriguez | | Illinois |
| Katrin Theodoli | | California |

| <u>Customer</u> | <u>NOVEMBER 1989</u> | <u>State</u> |
|--------------------|----------------------|--------------|
| Stephen Fornio | | Georgia |
| J.L. Nyce/IMG Ltd. | | Missouri |
| D. Todd | | Florida |

In an affidavit dated December 20, 1991, the president of F & R stated that Global contacted F & R directly to arrange shipments, that F & R was not contacted by the purchasers and that shipments were sent freight collect. A second affidavit dated February 24, 1994 of the president of F & R stated that Global had shown the bills of lading relating to the following shipments to F & R and F & R had picked up and delivered the shipments listed. The customers and their states were as follows:

| <u>Customer</u> | <u>State</u> |
|-------------------|--------------|
| Theodore Feder | California |
| Robert Lyons | Florida |
| Bernhard Antiques | Florida |

Michael Rubin/Howard Art
J. Lyons
Barbro Katof
Trudy Zink
Hastemi House Interiors
Claudia Ruger
Joseph Barocas Interiors
Susan Bines

Illinois
Florida
New Jersey
North Carolina
Virginia
Connecticut
Virginia
Alabama

Petitioner also presented sales invoices, shipping orders and bills of lading for merchandise shipped by Bedco and Yellow Freight to Global's out-of-state customers. The dates of the transactions, customers, customers' locations, amounts of the sales and carriers were as follows:

| <u>Date</u> | <u>Customer</u> | <u>Location</u> | <u>Amount</u> | <u>Carrier</u> |
|-------------|-----------------|------------------|---------------|----------------|
| 7/1/87 | C. Sleight | New Jersey | \$ 60.00 | Bedco |
| 7/15/87 | Fidelity | New Jersey | 5,550.00 | Bedco |
| 7/20/87 | Fidelity | New Jersey | 3,590.00 | Bedco |
| 7/23/87 | Fidelity | New Jersey | 1,075.00 | Bedco |
| 7/30/87 | S. Landman | Louisiana | 80.00 | Bedco |
| 11/15/89 | P.G. Foote | Ohio | 950.00 | Yellow Freight |
| 11/17/89 | L. Bafalis | Washington, D.C. | 1,500.00 | Yellow Freight |
| 11/29/89 | L. Bafalis | Washington, D.C. | 540.00 | Yellow Freight |

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices. The resort to external indices is predicated upon a finding of insufficiency in the taxpayer's recordkeeping such that verification of sales is a virtual impossibility (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). In such circumstances, the Division must select a method of audit reasonably calculated to reflect tax due (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219), and the burden is on petitioner to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542).

To determine the adequacy of a taxpayer's records, the Division must first request and

thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of King Crab Restaurant v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of this examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., supra; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989).

B. The auditor mailed an appointment letter to Global (see, Finding of Fact "2") in which books and records were requested. Global provided all records relating to sales except documentation concerning claimed nontaxable sales, such as sales for resale, out-of-state sales and sales to nontaxable entities. As the records were deemed adequate, an Audit Method Election form was executed indicating a test period method audit would be used in the area of sales. Sales which lacked nontaxable documentation were deemed taxable. Under these circumstances, it was proper for the Division to rely on the presumption of taxability contained in Tax Law § 1132(c) with respect to the unsubstantiated exempt sales (Matter of Academy Beer Distributors, Tax Appeals Tribunal, January 21, 1993, confirmed 202 AD2d 815, 609 NYS2d 108, lv denied 83 NY2d 759, 616 NYS2d 14).

C. In this case, there is no challenge to the adequacy of the Division's request for and review of Global's books and records for the audit period. Rather, the Division made such request and reviewed the materials presented by Global. In fact, the Division's calculation of tax due is based on an agreed three-month test of Global's books and records because Global's books and records were deemed adequate. The Division assessed as taxable a percentage of Global's gross receipts, based on Global's inability to present documentation as requested substantiating that such receipts were not taxable as claimed.

D. Global continues to claim nontaxability with regard to the challenged receipts, based on alleged out-of-state sales. In fact, Global's claim has become, most specifically, that all the remaining claimed nontaxable sales represented out-of-state sales of its goods. Global has

conceded that portion of the assessment relating to accrued sales tax, purchases of furniture and fixtures and purchases of recurring expenses. Accordingly, this portion of the assessment (see, Findings of Fact "5" and "6") is sustained. In addition, no evidence or argument was submitted regarding petitioner Moussa Marizadeh's liability as an officer of Global, pursuant to Tax Law §§ 1131(1) and 1133. Therefore, the assessments issued to Mr. Marizadeh are unchallenged and are sustained. The only real issue remaining is whether and to what extent Global has established proper nontaxability of such sales.

E. Tax Law § 1132(c) sets forth an initial presumption of taxability with regard to receipts such as those at issue herein, and places the burden of establishing nontaxability upon the person making such claim, i.e., Global (Matter of Sunny Vending Co. v. State Tax Commn., 101 AD2d 666, 475 NYS2d 896). To demonstrate that certain sales are not subject to tax, as claimed, Global must be able to offer substantiation, in the type of case at hand, specifying the amounts of the particular sales made to the various out-of-state purchasers and confirming that the merchandise sold to such purchasers was shipped (delivered) out of state. Put another way, Global would be expected to present sales invoices or other records of individual sales together with related shipping invoices, log books or the like from parcel delivery services (e.g., United Parcel Service, Federal Express, etc.), commercial carriers, truckers, etc. (Matter of Karolight, Ltd., Tax Appeals Tribunal, November 17, 1994; see, 20 NYCRR 533.2[b]).

F. On audit and at the BCMS conference, Global was able to furnish evidence establishing some out-of-state sales of its merchandise. At the hearing, Global submitted direct documentary proof (sales invoices, shipping orders and bills of lading) proving that such transactions were out-of-state sales of merchandise (see, Finding of Fact "9"). However, Global was unable to furnish any additional direct documentary evidence relating to any other sales of its merchandise. The only other evidence Global produced was the testimony of Mr. Sedge to the effect that Global used common carriers for out-of-state shipments and customers were not involved in the insurance settlements of goods damaged in transit, and the affidavits from Bedco and F & R.

The testimony of Mr. Sedge is general and unsupported by direct documentary evidence. The two affidavits of the common carriers suggest their own weakness. Both affidavits contain a list of customers located outside New York State and a statement that the deliveries were made by the respective carrier. In addition, the affidavits state that Global showed the carrier the shipping documents that relate to the deliveries and customers listed. One affidavit was dated approximately one week prior to the initial hearing in this matter, while the other is dated approximately 10 days after such hearing. Unfortunately, except for the documents discussed in Finding of Fact "9", Global failed to place into the record of this matter the shipping documents relating to the customers referred to in the affidavits. No explanation for their unavailability was provided. Therefore, only those deliveries listed in Finding of Fact "9" which have been established to be out-of-state deliveries are to be removed from the audit findings.

G. Under Tax Law §§ 1134(a) and 1136(a), as a person required to collect sales tax, Global was required to file a certificate of registration, obtain a certificate of authority to collect sales tax and file and pay the sales tax due. Its failure to do so justified the imposition of penalty (Tax Law § 1145[a][1], [3]).

Furthermore, Global's reliance on professional advice is insufficient to warrant abating penalties and interest because such reliance was not reasonable given the clarity of the legal requirements that were ignored (cf., Aire Bon Associates, Tax Appeals Tribunal, April 18, 1991).

H. The petition of Global Imports Outlets, Inc. and Moussa Marizadeh, as officer, is granted to the extent indicated in Conclusion of Law "F", but is otherwise denied and the notices of determination and demands for payment of sales and use taxes due dated February 4, 1991, as modified at the BCMS conference and as reduced in accordance herewith, are sustained.

DATED: Troy, New York
February 9, 1995

/s/ Thomas C. Sacca

ADMINISTRATIVE LAW JUDGE